No. 428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SECURITIES AND EXCHANGE COMMISSION, *Petitioner*

v.

UNITED BENEFIT LIFE INSURANCE COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF IN SUPPORT OF PETITIONER

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INDEX

	Page
MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE	1
BRIEF FOR AMICI CURIAE IN SUPPORT OF PETITIONER	5
Statement	5
Summary of Argument	7
Argument	9
The Flexible Fund contract embodies a security	9
The investment risk in the traditional deferred annuity policy	15
The investment risk in the Flexible Fund contract	17
Split funding	26
The *Valic* decision	30
Conclusion	39

CITATIONS

CASES:

Prudential Insurance Co. v. *S.E.C.*, 326 F. 2d 383 (C.A. 3, 1964), *certiorari denied*, 377 U. S. 953 (1964) .. 12
S.E.C. v. *Howey Co.*, 328 U. S. 293 (1946) 11, 25, 30
S.E.C. v. *Joiner Leasing Corp.*, 320 U. S. 344 (1943) ..11, 25
S.E.C. v. *Ralston Purina Co.*, 346 U. S. 119 (1953) 18
S.E.C. v. *Variable Annuity Life Insurance Company*, 359 U. S. 65 (1959) .....*passim*
Spellacy v. *American Life Ins. Co. Association*, 144 Conn. 346, 131 A.2d 834 30

STATUTES:

Investment Company Act of 1940, Act of August 22, 1940, C. 686, Title I, 54 Stat. 789, U.S.C.A., Title 15, § 80a-1 *et seq.*:

Section 2(a)(35), 54 Stat. 790, U.S.C.A., Title 15, § 80a-2(a)(35) 11

Page

Section 3(c)(3), 54 Stat. 797, U.S.C.A., Title 15, § 80a-3(c)(3) 10

McCarran-Ferguson Act, 59 Stat. 34, 15 U.S.C.A. § 1012(b) 10

Securities Act of 1933, Act of May 27, 1933, C. 38, Title I, 48 Stat. 74, U.S.C.A., Title 15, § 77a *et seq.*:

Section 2(1), 48 Stat. 74, U.S.C.A., Title 15, § 77b(1) 11

Section 3(a)(8), 48 Stat. 75, U.S.C.A., Title 15, § 77(c)(a)(8) 10

MISCELLANEOUS:

Bellinger, Hagmann and Martin, *The Meaning and Usage of the Word "Annuity"*, 9 J. Am. Soc. Ch. L. Under, 261 (1955) 36

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H. Rep. No. 85, 73d. Cong. (1933) 13

H. Rep. No. 2639, 76th Cong. (1940) 12

Magee, *Life Insurance* (3d ed. 1958) 24, 26, 35

Mehr and Osler, *Modern Life Insurance* (3d ed. 1961) 16, 17, 35

S. Rep. No. 1775, 76th Cong. (1940) 12

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The National Association of Securities Dealers Inc., ("the Association") and Investment Company Institute ("the Institute") hereby move this Court, pursuant to Rule 42(3), for leave to file a joint brief on the merits as *amici curiae* in support of the Securities and Exchange Commission ("the Commission"). A petition for a writ of certiorari was granted on October 24, 1966.

The Association and the Institute participated below. With leave of the court of appeals, they filed a joint

brief as *amici curiae,* and with the Commission's permission shared its time for oral argument.

At issue is the availability of the insurance exemptions in the securities laws to a Flexible Fund contract. This, in turn, involves the construction of this Court's decision in *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Company,* 359 U.S. 65.

The Association was an intervenor in that litigation, supporting the Commission, and a petitioner for the writ of certiorari, which this Court granted.

The issue in this proceeding is of great importance to the members of both the Association and the Institute.* The Association is a creature of the securities laws. Its activities constitute an integral part of the Federal system of securities regulation, and include important regulatory functions in the sale of open-end investment company shares. Approximately 90 per cent of its 3700 broker-dealer members sell shares of open-end investment companies from time to time. The Institute is an association of 178 open-end investment companies with assets of approximately $32 billion, and also of 89 investment advisers and 79 principal underwriters to these investment companies. The membership of both organizations are subject to applicable regulatory requirements of the Securities Act of 1933, the Investment Company Act of 1940 and the Securities Exchange Act of 1934.

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* A joint motion of the parties to accelerate the trial of the case filed in the District Court on December 23, 1964, states (at pp. 2-3): "The present case raises an important issue. From the Commission's point of view, the decision in this case will have significant impact on the securities industry in general and on investment companies in particular."

The Association and the Institute are vitally concerned that the regulation of investment companies, of the securities they sell, and of those who sell the securities be uniform and be imposed fairly and without preference or discrimination. This case involves another attempt by an insurance company to engage in the securities and investment company business through the annuity medium without compliance with the securities laws.** The Flexible Fund Annuity, which will be offered in competition with the securities offered by members of the Association and the Institute, creates an investment medium which should not be sold unless the disclosure requirements of the Securities Act are satisfied. Its purchasers, like any investor in an investment company, should also have the protections afforded by the Investment Company Act. Those who distribute the Flexible Fund contract should, like any other dealer in securities, be subject to the disciplines of the securities laws.

In their joint brief below, the Association and the Institute presented an approach and argument which supplemented that urged by the Commission. It is noteworthy in this regard that the Commission was willing to allot part of its time for oral argument to the Association and Institute.

The impact of this Court's decision upon the members of the Association and the Institute will be direct

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** The Commission's Petition for a Writ of Certiorari stated (p. 14): "The effect of the decision below would be to permit insurance companies to sell shares in investment pools without complying with the statutes enacted by Congress for the protection of persons who purchase such shares. Almost any insurance company, including VALIC itself, could engage in the unregulated sale of such shares . . ."

and important. The Association and the Institute should be permitted to present their views with respect to the decision of the court below which directly affects the interests and business position of their members.

Respectfully submitted,

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BRIEF FOR AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT

The Investment Company Institute and the National Association of Securities Dealers, Inc. are not concerned in this brief with the merits of the contract under consideration. In their opinion, it provides an arrangement that is embraced by the securities laws and, like other investment company securities, may only be offered in compliance with those laws. They

are vitally concerned that (1) in purchasing the securities of an investment company the public be afforded the protections of the federal securities laws, and (2) regulation of investment companies and of the securities they sell be imposed uniformly and without discrimination among competitors.

An annuity and an insurance company have certain exemptions from the securities laws. This case involves another effort by an insurance company to employ the annuity umbrella for a common stock investment program. The base for the traditional fixed dollar obligations of insurance companies is fixed income securities. With inflation and the rising cost of living, insurance companies have designed programs to provide a purchaser, at his risk, with a participation in a common stock portfolio, on the premise that such stocks will rise during a period of inflation. The arrangement here is essentially an old package, in a new wrapping, that has been offered by others for some years now without denying investors the protections of the Securities Act of 1933 and the Investment Company Act of 1940.

An investment company is essentially a portfolio of securities in which investors have a participation. One form of investment company is the open-end type or, as it is commonly referred to, a mutual fund. A mutual fund makes a continuous offering of its shares, with the price determined by the value of the fund at the time of the offering. The fund stands ready to redeem its shares on the same basis. Its portfolio is managed by an investment adviser who is compensated in the form of a fee which is a percentage (often ½ of 1% annually) of the value of the assets of the fund.

A periodic payment plan for purchase of investment company shares provides a means for accumulating shares of the company over a period of years on the installment basis. One of the abuses found by the Congress in the sale of these plans prior to the passage of the Investment Company Act was the effort by some companies to liken them to insurance plans, which were associated in the public mind, and correctly so, with fixed dollars and assured interest return. This is not the nature of a periodic payment plan, however. A holder of such a plan may receive more or less than his payments depending upon the investment experience and resulting values of the portfolio or fund in which he invests.

The holder of a Flexible Fund contract (PX. 2, R II-2) offered by United Benefit Life Insurance Company ("United"), which is fully described in the brief of the Securities and Exchange Commission ("the Commission"), purchases on an installment plan an interest in a segregated fund of securities, primarily common stocks. The cash value of this participation, which is measured by and varies with the investment experience of the Flexible Fund account, may be withdrawn or later used to purchase a conventional fixed dollar annuity, with a provision for a minimum cash value that is never as much as the purchaser's deposits. The program is featured as an investment opportunity to gain through common stock investment.

SUMMARY OF ARGUMENT

In *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Company,* 359 U.S. 65 ("*Valic*"), this Court held that a variable annuity contract was an investment contract and not exempt

from the securities laws as insurance. The Flexible Fund contract, like the Valic contract, embodies an investment program. United offers the contract for investment purposes. Its stated attraction is the opportunity for gain, under United's management, from a continuation of the historical trend of rising common stock prices, with the contract holder bearing the investment risk involved. The Flexible Fund contract, unlike the Valic contract, does provide for a minimum fixed payment, but this does not render it "insurance" within *Valic*.

An insurance company traditionally guarantees to enhance the premiums paid by providing a fixed return or guaranteed yield on the premiums. The insured thus shifts to the insurer the risk of profitable investment of the premiums. During the accumulation period in a conventional annuity, the policy holder builds up a fund which he can either withdraw or apply to the purchase of an annuity, made up of (1) his net premiums and (2) the fixed return on the net premiums which the insurer guarantees. In an annuity context this aggregate is the principal for which the annuitant bargains and which the company assures.

United escapes this basic and substantial investment risk under the Flexible Fund contract. There is no provision for a guaranteed, fixed return during the accumulation period. The contract holder alone bears this risk of a return. He is thus cast in the role of the investor, which is the insurance company's traditional role. It is this assumption of investment risk by the contract holder which makes the securities laws applicable.

Valic held that "insurance" involves "some investment risk-taking on the part of the company" and that

"the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense." The *sine qua non* of "investment risk-taking" is a guaranteed "fixed return." A return is a yield on capital, as distinguished from a simple giving back of the capital itself. A contract, such as the Flexible Fund contract, that does not provide a fixed return or yield on premiums throughout its life is, therefore, not "insurance" within *Valic*.

As an economic medium from the purchaser's viewpoint, the Flexible Fund contract is simply a form of "split funding" program, offered by others for some years, for the accumulation of mutual fund shares and the purchase of traditional deferred fixed dollar annuity policies. The Flexible Fund contract differs only in that it homogenizes the two components and obscures their identity. Valic itself makes available what the Flexible Fund contract provides.

ARGUMENT

The Flexible Fund Contract Embodies a Security

In *Securities and Exchange Commission* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, ("*Valic*"), this Court concluded that the variable annuity was an investment medium which could be offered only if investors were provided the disclosures which the Securities Act elicits to permit an informed investment judgment and that it was an investment arrangement that brought into play the added investor protections afforded by the Investment Company Act.[1]

[1] The provisions of both statutes are discussed in the Commission's brief and will not be repeated here.

The Valic contract, like the Flexible Fund contract, was cloaked in the terminology and formalities of a conventional annuity policy and was subject to state insurance regulation. The Valic contract provided, in substance, that installment payments made by purchasers would be invested in a portfolio of securities, principally common stocks, and that the amount of payments to be received by the purchasers on retirement, and the amount of the cash surrender value prior to retirement, would vary with the investment experience of the portfolio. It was contended that this arrangement, as United urges here with respect to the Flexible Fund contract, was encompassed by the exemption provided in Section 3(a)(8) of the Securities Act for an annuity contract, by the exemption in Section 3(c)(3) of the Investment Company Act for an insurance company and by the McCarran-Ferguson Act which preserves state regulation of insurance.[2]

The majority opinion in *Valic*[3] pointed out that the "question common to" these three statutory provisions "is whether respondents are issuing contracts of insurance" 359 U.S. at 68. It was urged that since the issuer assumed the risk of mortality (the obligation to make annuity payments as long as the contract holder lived), the variable annuity was insurance and that it was not necessary under an insurance arrangement that the company assume an investment risk. Both these arguments were rejected as more fully set forth below.

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[2] The text of these statutory provisions is set forth in the Commission's brief.

[3] Two Justices who joined in the majority opinion also joined in a concurring opinion. Four members of the Court dissented in a separate opinion.

Since the variable annuity, stripped of its formalities, was an arrangement by which a person committed his funds to management by others and looked to their efforts for his profits, the variable annuity was a security. One again the breadth of the statute's sweep was reaffirmed. The Court called attention to its earlier definition in *S.E.C.* v. *Howey Co.*, 328 U.S. 293, 298-299, of an investment contract, specifically referred to in the statute as a security:[4]

> ". . . an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."[5]

Since the variable annuity was a security, it followed that the Investment Company Act applied because the arrangement was an investment medium providing an

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[4] Section 2(1) of the Securities Act and Section 2(a)(35) of the investment Company Act contain identical definitions of the term "security".

[5] In the *Howey* case, the investment contract encompassed an offering of a unit of acreage in a citrus grove, coupled with an offer by an affiliated company to service the acreage for the purchaser.

Previously, in *S.E.C.* v. *Joiner Leasing Corp.*, 320 U.S. 344, 352-353, in holding that an offering of oil leases coupled with the assurance of the drilling of a test well so located as to test the oil-producing possibilities of the offered leaseholds was an investment contract, the Court stated:

> "The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect."

interest in a managed portfolio of securities. This is precisely the type of investment vehicle which the statute denominates as an investment company in whatever mold it is cast. As conceived by the statute, investment companies essentially "are large liquid pools of the public's savings entrusted to management to be invested."[6] They "provide a medium for public investment in common stocks and other securities."[7]

The Flexible Fund contract, like the Valic contract, embodies an investment program emphasizing common stocks to which the purchaser looks for profit. United's sales brochure (PX. 3, R II-10), discussed more fully below, speaks of three steps necessary to build "a balanced and adequate estate . . . (1) save, (2) insure, (3) invest." The brochure then states that "a new idea has been developed that combines these three essential steps into one simple plan." The brochure explains that the contract "combines this new method of accumulation" (i.e., investment in common stocks which "gives the policy owners the opportunity for a greater return on the accumulated deposits and a chance to share in the growth of the country's economy") "with the time tested advantages of a lifetime annuity." (R II-12) United's newspaper advertisements on the contract carry the banner "New Opportunity for Financial Growth" (PX. 6; R II-26). But Congress did not intend the Section 3(a)(8) exemp-

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[6] H. Rep. No. 2639, 76th Cong., p. 6 (1940) accompanying H. R. 10065 which the House of Representatives passed.

[7] S. Rep. No. 1775, 76th Cong., p. 2 (1940) accompanying S. 4108 which the Senate passed.

Prudential Insurance Co. v. *S.E.C.*, 326 F. 2d 383 (C.A 3), *certiorari denied*, 377 U.S. 953, affirmed a Commission determination that a segregated account created by a life insurance company for the sale of variable annuities is an investment company.

tion for a contract with this investment purpose. The reason for the exemption was explained as follows when the Securities Act was passed:

> "The insurance policy and like contracts are *not* regarded in the commercial world as securities *offered to the public for investment purposes.*" (Emphasis added)[8]

The majority opinion in *Valic* pointed out:

> "The standards for investment of funds underlying these [traditional fixed dollar] annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy." 359 U.S. at 69.

Here United anticipates that approximately two thirds of the Flexible Fund Account will be invested in equities.[9] It acknowledges that the contract provides "Variable benefits until maturity."[10] While the an-

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[8] H. Rep. No. 85, 73d Cong., p. 15 (1933).

[9] In Defendant's Responses to Supplemental Requests for Admissions, filed July 15, 1963, United (at p. 23) admitted that "at the time 'Flexible Fund A account' was established, the defendant believed that consistent with its guarantee, approximately one-third of the money in the 'Flexible Fund A account' should be invested in fixed dollar securities and that approximately two-thirds should be invested in equities." This response was not included in the excerpts of the pleading printed in the record (R II-99).

[10] United in a letter of May, 1962, to a state insurance commissioner stated:

> "Up to now, we have found rather general acceptance of the word 'Flexible' as having the same connotation as the word 'variable'".

United then offered to add the following to its forms:

> "Variable benefits until maturity." (PX, 10; R I-86).

nuity after maturity will be of a level dollar amount, that amount will vary too depending upon investment success and the consequent value of the Flexible Fund at the time of maturity.

The Flexible Fund contract differs from the Valic contract in only one essential respect, i.e., the promise of a minimum, fixed payment measured by net premiums.[11] This, in our view, affords no basis for distinction in the application of the securities laws because the Flexible Fund arrangement nevertheless embodies an investment contract. In *Valic* the fortunes of the contract holder depended upon the results of an investment fund, and it was held the issuer of the contract did not assume the investment risk contemplated by "insurance". When the contract holder, here as in *Valic*, albeit not in the same degree, becomes a direct participant in the investment experience of an investment fund, he assumes investment risks which are the target of the securities laws and trigger their application.

Before analyzing the *Valic* decision we shall discuss (1) the character of the investment risk traditionally assumed by an insurance company, (2) the shifting of this investment risk here to the contract holder, and (3) so called "split funding" programs for the accumulation of mutual fund shares and the purchase of traditional deferred fixed dollar annuity policies from which the Flexible Fund contract differs basically only in that it homogenizes the two components and obscures their identity.

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[11] The minimum represents 25% of the gross amount paid by the contract holder in the first year and increases thereafter but never can be as much as 95% of the gross amount paid (R II-3, para. 7). Over a 25 year period, the net premiums will be 91.58% of the total premiums paid (R II-13).

The Investment Risk in the Traditional Deferred Annuity Policy

The vice president and actuary of United, Dale R. Gustafson, in an affidavit filed by United in support of a motion for summary judgment, discussed certain commonly accepted principles of annuities. He pointed out, *inter alia*:

> "The annuity contract protects against the hazard that the annuitant will 'outlive' his *capital*. In both the instance of the life insurance contract and in the instance of the annuity contract *the insured transfers to the insurer risks* which without such transfer would remain the insured's risk." (Emphasis added. Aff. p. 6)

Elaborating on this matter of transfer of risks, Mr. Gustafson stated:

> "Whole life policies and annuity policies contain essential ingredients of risk transfer. From the insurer's point of view in each instance there is a transfer from the insured to the insurer of four basic risks which may be described as (1) death risk; (2) *investment risk;* (3) expense risk and (4) annuity risk.
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> * * *
>
> "*Investment risk:* In the typical level premium policy issued by an insurer, . . . net premiums, that is, the gross premiums less expenses and charges, are invested and accumulated by the insurer. *The insurer guarantees the rate at which these net premiums will be accumulated throughout the life of the contract. The amount of such accumulation is the cash surrender value of the policy.* Thus, in the typical whole life contract the insurer guarantees an accumulation rate as set out in the contract not merely on amounts of net premiums presently held by the insurer but on amounts of net premiums to be received indefinitely in the future." (Emphasis added, Aff. p. 8).

Mr. Gustafson stated that in "the case of the policies other than the [Flexible Fund] policy, the investment risk is based on a provision obligating the Company to accumulate net premiums at a *fixed rate* (usually 2½ or 3 percent per annum)." (Emphasis added. Aff. p. 12) He further pointed out that under the conventional deferred annuity policy which United issues, it "obligates itself to accumulate amounts of net premiums at an accumulation rate equal to 3 percent per annum" (Aff. p. 10). The amount of this fixed return to which a company commits itself for the life of the contract varies in accordance with the investment risk or exposure that the company is prepared to assume. For example, during the course of this litigation, United increased the interest assumption or guaranteed, fixed return in its conventional annuity from 2½% to 3%.

During the period that the insurer makes annuity payments, it also assumes an interest rate on the principal used to purchase the annuity and thereby guarantees a fixed return. Each annuity payment includes principal and income on the unliquidated principal.[12]

In other words, in a retirement annuity the insurer obligates itself to enhance premiums by providing a fixed return or income throughout the life of the contract (and this is so even if there is no provision for a cash surrender value). This is its investment risk, which is at the very heart of the contract. The obligation of the insurer, as reflected, for example, in the cash value of the contract, is not limited to net premiums. An obligation restricted to net premiums does not satisfy the insurance concept of risk-bearing. It does not provide the guaranteed investment benefit that is

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[12] See Mehr and Osler, *Modern Life Insurance* (3d. ed. 1961) pp. 80-81 for the method of computing an annuity payment.

inherent in insurance. The insurance company is not simply a "strong box".

In view of these features, a retirement annuity during the accumulation period has been likened to a savings contract.[13] During this period the policy holder builds up a fund which he can either withdraw or apply to purchase an annuity. This fund or "capital", to use Mr. Gustafson's apt characterization, is made up of joint contributions by the insured and the insurance company: (1) net premiums paid by the insured and (2) the accumulated fixed return over the pay-in period to which the insurer obligates itself. In an annuity context it is this aggregate, rather than net premiums, which constitutes the policy holder's principal. This is the principal for which the annuitant bargains. His sole purpose in purchasing a deferred annuity is to be assured this principal, which is the base of his annuity payments and is liquidated during the pay-out period. This principal is not diminished if the insurer is unable to invest premiums on a basis which will produce the promised fixed return. The company has assumed, and the insured has shifted to it, this risk of profitable investment of the premiums. The policy holder is, therefore, not concerned with investment risk, the focal point of the securities laws, but only with the insurer's ability to meet its fixed obligations, which is the province of state insurance regulation.

The Investment Risk in the Flexible Fund Contract

Under the Flexible Fund contract, the holder is not assured the principal provided by the conventional deferred retirement annuity during the accumulation period. United does not obligate itself to enhance

[13] Mehr and Osler, *ibid*, p. 83.

premiums. Every purchaser of the Flexible Fund contract is required to agree in his application that:

> "I understand that the *growth* of the fund arising from my deposits *is not guaranteed, but will depend upon* the *investment results* of the securities purchased for this segregated fund." (Emphasis added. PX. 2. R II-8.)

The Flexible Fund contract holder, therefore, alone assumes the investment risk—and it is very substantial as we shall show—of a return, which is the obligation of the insurance company in a conventional deferred annuity policy. United escapes this risk and transfers it to the Flexible Fund contract holder. He does not have the assured savings arrangement, free of investment risk, which is the very purpose of a conventional deferred annuity. Instead, he is cast in the role of an investor with a direct interest in the investment experience of a managed portfolio of securities. And it is precisely for this reason that the Securities Act and the Investment Company Act have meaningful relevance and apply. As this Court observed in construing an exemptive provision of the Securities Act: "The focus of the inquiry should be on the need of the offerees for the protections afforded by registration." [14] Nor is the Flexible Fund contract holder any less an investor needing and entitled to the protection of the securities laws because United may have an investment risk under the minimum guarantee, a factor to which the court below gave controlling weight, without regard to the contract holder's risk as an investor, the touchstone of the securities laws.

The dollar consequences involved in the investment risk assumed by the Flexible Fund contract holder are

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[14] *S.E.C.* v. *Ralston Purina Co.*, 346 U.S. 119, 127.

very substantial. The record contains by way of illustration a Flexible Fund contract (PX. 2, R II-2) and a conventional deferred retirement annuity of United (PX. 7, R II-27), both of which assume a holder entering into a contract at age 35 and making monthly payments of $100 for 30 years for an aggregate of $36,000. At maturity, the purchaser of United's conventional annuity would have a fund of $54,828. This amount would be available, at the holder's option, either for withdrawal or as the principal to be liquidated through annuity payments. Of this amount $33,174 represents the contribution of the policy holder, i.e. his net premiums,[15] and the balance of $21,654 is the fixed return guaranteed by United. United thus assures the policy holder an aggregate fixed return amounting to 65% of his contribution. Under the Flexible Fund contract, United wholly frees itself of this investment risk. The investment risk instead is borne by the contract holder as an investor. He is assured only of $33,174, the net premiums. Whether he receives any more, or indeed even as much as the $36,000 he paid, is his risk alone with his fortunes determined exclusively by the investment results of the Flexible Fund.[16]

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[15] This assumes the same loadings in the fixed dollar annuity policy as in the Flexible Fund contract.

[16] Since under the Flexible Fund contract, a holder is not assured the accumulation of capital which is inherent in a conventional deferred annuity, he has, when measured by the minimum guarantee, suffered an impairment of capital. The magnitude of this impairment is shown by the fact that in the case of the illustrative Flexible Fund contract it would take another 17 years, at a compound interest rate of 3%, the rate currently used by United in computing annuity payments, before the capital under that contract at maturity ($33,174) would be equal to the cash value ($54,828) under a like term conventional annuity.

In these circumstances, to argue, as does United,[17] that whatever the Flexible Fund contract holder receives in addition to the minimum are "bonus benefits" is incredible. A contract holder who had paid $36,000 over a thirty year period and then found that he was entitled to only $33,174 would not view himself as having missed an "extra", but rather as having made a "bad investment", particularly if he knew that had he purchased a fixed dollar contract he would have been entitled to receive $54,828.

It is interesting to observe that while the purpose of a deferred annuity is to build up principal, the amount guaranteed under the Flexible Fund contract in comparison with that guaranteed under United's conventional deferred annuity becomes progressively smaller the longer the term of the contract. Thus, for example, the amount of the principal under the Flexible Fund contract in relation to the amount under United's conventional annuity policy is 83 percent at the end of the 10th year, then decreases to 76 percent, 71 percent and 66 percent, at the end of the 15th, 20th and 25th years, respectively, and is only 61 percent at the end of the 30th year.[18] Viewed in this posture, the Flexible Fund contract holder finds himself not only not shifting the conventional investment risk, but assuming a relatively bigger investment risk the longer the accumulation period. The same relationship manifests itself in the annuity payments. Thus, the Flexible Fund contract holder is in the anomalous position that the longer

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[17] Brief in opposition to certiorari, p. 21.

[18] United in its brief below (p. 2) stated that the Flexible Fund contracts issued at the time of trial provided for maturity dates, on the average, 24.6 years from their respective dates of issue.

he accumulates the lower is his assured monthly retirement payment relative to the conventional annuity.[19]

[19] The following table sets forth for the terms indicated in the text (1) the total premiums paid (2) the guaranteed cash value at the end of the term, which can be withdrawn or applied to the purchase of an annuity, under United's conventional fixed dollar annuity and the Flexible Fund contract, and (3) the monthly annuity payment at age 65 which would be provided by these cash values under Option A referred to by United in its brief in opposition to certiorari (i.e., if the annuitant dies before he receives 120 monthly payments, the balance of the 120 payments will be continued to his beneficiary):

	(1)	(2)		(3)	
	Premiums	Guaranteed Cash Values		Monthly Annuity Payment[c]	
Term	Paid	Fixed[a]	Flexible[b]	Fixed	Flexible
30	$36,000	$54,828	$33,174	$345.42	$208.99
25	30,000	41,928	27,474	264.15	173.09
20	24,000	30,792	21,774	193.99	137.18
15	18,000	21,180	16,074	133.43	101.27
10	12,000	12,504	10,374	78.78	65.36

[a] Based on PX. 7, R II-31 without deduction of a service charge for monthly payments.

[b] Based on PX. 2, para. 9, R II-3.

[c] Based on a monthly annuity payment of $6.30 per $1,000 of cash value. PX. 7, R II-30, 34; PX. 2, R II-5.

Furthermore, in the case of the Flexible Fund contract the aggregate of the 120 minimum payments guaranteed under Option A will never be as much as the premiums, either gross or net, paid by the contract holder, as is shown by the following table which sets forth the aggregate amounts for that contract and for the fixed dollar annuity for the terms stated above:

	Aggregate—120 Payments	
Term	Flexible	Fixed
30	$25,079	$41,450
25	20,771	31,698
20	16,462	23,279
15	12,152	16,012
10	7,843	9,454

In the face of these facts, it is startling to find United urging[20] that "the annuitant acquires the FFA to obtain the guaranteed lifetime income provided thereby."

The inducement offered to the purchaser of the Flexible Fund contract, and the fact that he is cast in the role of an investor, is made clear, for example, by the sales brochure, the instrument of disclosure and description which United employs and which each purchaser must agree in writing that he has read (R II-8). The investment feature of the contract is emphasized.[21] The attraction is the opportunity for gain, under United's management, from a continuation of the historical trend of rising common stock prices, with the contract holder bearing the risk involved.[22]

The message of United's president which opens the brochure states that the contract offers the "opportunity to share in the growth of our economy"; that the savings are invested and "these securities, particularly the common stocks, provide the growth factor so

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[20] Brief in opposition to certiorari, p. 21.

[21] The retirement feature is referred to as an "additional attraction" and as an "option" (R. II-12, 11).

[22] In the context of securities, the minimum guarantee is simply a "sweetener", which United anticipates should not expose it to any liability (although whether or not it does is irrelevant). It is not uncommon for a security to provide an added element as an inducement to an investor. This is also the purpose, for example, of a convertible feature added to a security. While the commonly known conversion privilege today permits a holder of senior securities to convert his position into equity securities, junior securities have been issued which permitted the holder to convert his interest to a senior position. See Dewing, *Corporation Securities*, p. 391 (1934). This suggests another way of viewing the instant arrangement. While in *Valic* the contract was simply an equity security, the Flexible Fund contract is an equity security with a convertible feature.

important to you during your 'savings years' "; that investments "are selected for quality and growth potential"; and that "this will, we believe, prove an ideal plan for those who wish the opportunity for substantial growth in their savings." (R II-11) The brochure then explains that deposits "can be invested largely in common stocks" which "gives the policyowners the opportunity for a greater return on the accumulated deposits and a chance to share in the growth of the country's economy." It is pointed out that this is "a new method of accumulation". (R II-12) The brochure answers the question "How Are the Investments Handled?" with the assurance that the contract "gives you the Benefit of full-time professional investment management" which "adheres" to certain "sound investment principles and methods" that are then set forth (R II-15). To dramatize the opportunity for sharing in the growth of the American economy and the dollar consequences of successful investment, charts with overlays are presented of the rising Dow-Jones stock averages over a quarter of a century and of "the Rate at which Money Grows" when advantageously invested (R II-16).[23] Next, the brochure urges the im-

[23] One chart shows that if $100 a month had been deposited monthly over the period for an aggregate of $30,000 and accumulated according to the Dow-Jones average it would have a value of some $180,000. If an investment company used such material, it would violate the Statement of Policy on the sale of investment company securities adopted by the Commission to implement the anti-fraud provisions of the securities laws (PX. 15, R II-93). While United professes not to be selling an investment company security, its "Sales School Outline" (PX. 4) contains a "What We Can and Cannot Say Memorandum" which summarizes the Statement of Policy and recommends "careful reading" of that Statement "for a clear-cut directive of what is suitable and what is not suitable for advertising and sales literature for any *investment fund*". (Emphasis added.)

portance of a long-range plan of investment, referring in this regard again to the "long-term growth of the economy", and pointing out that time is necessary to get the full benefit from "Dollar cost averaging", which is explained as "simply a method of investing" practiced "by experienced professional investors to help get the best results from long-term trends in the stock market." The prospect is assured that "regular" deposits make " 'Dollar cost averaging' principles work for you." (R II-17)[24]

This is the sales appeal of the Flexible Fund contract. It is to be appraised under the securities laws

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[24] As one insurance text writer points out, the "investment theory behind the variable annuity contemplates . . . the periodic purchase of common stocks following the principle known as 'dollar averaging.' Dollar averaging has been a practice long known to the investment industry." Magee, *Life Insurance* (3d. ed. 1958), p. 77.

An article cited in *Valic*, 359 U.S. at 71, note 12, Haussermann, *The Security in Variable Annuities*, Ins. L.J. June 1956, p. 382, concludes with the following observation (at p. 392):

> "They talk about the advantages of dollar-cost averaging by regular purchase of common stocks regardless of the level of the market. They talk about the participation in the expected growth of the American economy through ownership of common stocks. They talk about the investment results of investing in common stocks regularly during different periods and that such long-term regular investing minimizes the risk.
>
> "This is not insurance talk; this is the talk of the securities salesman. This is the kind of talk he makes when attempting to interest a prospect in purchasing common stocks . . . [U]ntil certain insurance companies proposed to issue variable annuities this kind of talk was never heard from an insurance salesman attempting to sell insurance or annuities . . . [I]f you are going to describe a certain animal as very large, four legged, with a tail and a long trunk, you ought to be willing to call it what it is, namely, an elephant."

in that light. "In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be".[25] The fact that the investment program offered is coupled with an annuity arrangement is no reason to deny vitality to the securities laws during the accumulation period and to deprive the investor of the meaningful and relevant protections they provide. As this Court has pointed out,

> "It [the Securities Act] embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits." *S.E.C.* v. *Howey, supra.* 328 U.S. at 299.

Moreover, the Flexible Fund arrangement by design provides for divisible and separate relationships. In the accumulation period, the holder's interest is in the Flexible Fund. His accumulated value, as United's actuary put it, is a "direct reflection of the investment experience" of the Flexible Fund (Aff. p. 26). On retirement his interest in the Fund terminates. His fortunes are no longer measured by the investment experience of the Fund. This severable nature of the arrangement is made clear on the face of the Flexible Fund contract (PX. 2; R II-2), which states:

> "Prior to the Maturity Date, the value of this policy is not guaranteed other than as specifically provided herein, but will depend upon the investment experience of the Flexible Fund A.
>
> "After the Maturity Date, the benefits payable hereunder will be fixed in amount, and will no

[25] *S.E.C.* v. *Joiner Leasing Corp., supra,* 320 U.S. at 353.

longer depend on the investment experience of Flexible Fund A."

We turn now to a consideration of split funding, which is another way of analyzing the Flexible Fund arrangement, and reveals the program for what it is from a contract holder's viewpoint.

Split Funding

Writing in 1958, before the *Valic* decision, John H. Magee, in his text *Life Insurance* (3d. ed.), discussed the variable annuity and pointed out that its proponents advocated that an annuity program should provide a mix of both fixed dollar and variable annuities. In this connection he called attention to the fact that College Retirement Equities Fund, the variable annuity pioneer,[26] was set up as part of a retirement annuity plan under which a participant could apply from one quarter to one half of his total contributions to the purchase of a variable annuity and the balance to the purchase of a fixed dollar annuity. The text then continues (at pp. 78-79):

> "*Fixed Return Annuity Combined with Equity Investment*—A unique plan has been offered that undertakes to attain the end sought by the variable annuity. It combines an investment in a fixed income deferred annuity and an investment in equity securities by the purchase of shares in a mutual fund.
>
> Both the deferred annuity contract and the systematic accumulation feature of the plan require regular payments. These may be monthly, quarterly, or annually. The proportion of income devoted to each is optional. The payments on the

[26] See *Valic*, 359 U.S. at 69.

deferred annuity go directly to the life insurance company as they are made. The payments made to purchase stock in the mutual fund go directly to the fund management. This fund provides for the automatic reinvestment of any distribution paid with respect to stock accumulated. On reitrement date, which is ordinarily the same date as that selected for the maturity of the deferred annuity contract, all or any portion of the accumulation in the mutual fund may be used to purchase a single payment annuity contract. These, in turn provide for optional incomes at rates guaranteed as of the date the annuity was purchased.

Under the plan, for example, an investor could pay $50 a month on a deferred annuity contract and $50 a month to the mutual fund to accumulate an amount for the purchase of a single payment annuity at the date of retirement. The deferred annuity contract would guarantee a fixed-dollar annuity. A single payment annuity purchased from the funds accumulated by the mutual fund would, of course, vary with the amount of accumulation."

Although the text does not identify the companies involved, the reference in all likelihood was to a combination program for the purchase of a conventional deferred fixed dollar annuity and an accumulation of investment company shares first offered in 1957 by Standard Life Insurance Company and its affiliate Advisers Fund, Inc., a mutual fund subject to both the Securities Act and the Investment Company Act. Purchasers of the investment company shares can convert their shares, at no additional cost, into a fixed dollar annuity based upon an annuity table guaranteed at the time the shares were purchased. The program is known as the Retirement Equity Accumulation Program ("R.E.A.P.") and now also includes conventional life

insurance.[27] A sales brochure in the Commission's public files explains:

> "R.E.A.P. is a modern investment concept of using variable and guaranteed dollars to provide a balanced financial program. It offers you the opportunity to hedge against inflation, through the accumulation of variable dollars, as well as deflation by accumulating guaranteed dollars, with the ultimate goal of building a retirement income."

Currently, there are various combination arrangements offered to provide by means of split funding, as it has come to be known, (1) "guaranteed" dollars through the purchase of conventional life insurance products which can be used to provide fixed dollar annuities and (2) "variable" dollars through the purchase of mutual fund shares.

As an economic medium from the purchaser's viewpoint, the Flexible Fund contract is simply a form of split funding. This is evident when the Flexible Fund arrangement is recast in terms of a package consisting of United's conventional fixed dollar annuity and mutual fund shares. The following table sets forth (1) the minimum cash value under the Flexible Fund contract at the end of stated terms assuming premiums annually of $1,200, (2) the amount of annual premiums that would have to be paid under United's conventional fixed dollar annuity to provide the same cash value, (3) the percentages this premium represents of the total annual payment, which percentages are identical to those reflecting the relationship of the minimum guarantee under the Flexible Fund contract to the cash value under United's conventional annuity presented

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[27] See Wm. H. O'Brien, *Static Dollars? Dynamic Dollars? Why Not Have Both,* Investment Dealers' Digest, Mutual Fund Supplement Section, p. 56, April 25, 1960, for a description of the program.

above, and (4) the balance, stated in percentages, of the total premium that would be available for the purchase of mutual fund shares, which is a measure of the investment or risk factor:

Term	Minimum Cash Value	Annual Premium: For Fixed Dollar Annuity[a]	Annual Premium: As % of $1,200 Payment Annually	Balance Available for Mutual Fund Shares
30	$33,174	$726	60.5%	39.5%
25	27,474	786	65.5%	34.5%
20	21,774	849	70.8%	29.2%
15	16,074	911	75.1%	24.9%
10	10,374	996	83.0%	17.0%

[a] Based on PX 7, R II-31.

From the purchaser's viewpoint, this analysis is a realistic appraisal of the Flexible Fund contract and reveals it for what it is.[28] Viewed in this light, should the purchaser of the Flexible Fund contract be any less a ward of the securities laws than the purchaser of a combination package under a split funding arrangement? Both arrangements offer the identical medium. The Flexible Fund contract differs only in its opaque wrapping which obfuscates the identity of the components clearly revealed in split funding. Split funding is a single program that takes the form of two integrated contractual arrangements; the Flexible Fund plan embodies the same program in one contract. The substance is the same, only the form differs. In the securities laws "[f]orm was disregarded for substance and emphasis placed upon economic reality,"

[28] Since the concept of "variable" dollars is designed as a hedge against inflation through the increase in common stock prices, the mutual fund component should be greater the longer the term of the split funding.

as this Court pointed out in *Howey, supra,* 328 U.S. at 298. Because United has homogenized and thereby obscured the severable ingredients of split funding is no reason to exempt the investment company feature of the Flexible Fund contract as an annuity.

Indeed, Valic itself makes available under the aegis of the securities laws a combined package which can be used precisely as the Flexible Fund contract. According to Valic's Securities Act prospectus for its variable annuity, Valic offers combined deferred annuity contracts. Under such contracts from 20 percent to 80 percent of the purchaser's payments may be applied to the variable component and the balance to a fixed dollar annuity. Since the contract holder may elect at retirement to purchase a fixed dollar annuity with the proceeds of his variable investment, his annuity can be wholly of the fixed dollar type, just as provided here.[29]

The Valic Decision

From its brief in opposition to certiorari we assume that United has abandoned its thesis, unsuccessfully urged in the court below, that under *Valic* an insurance product is involved so long as the "annuity provides some level of fixed installments during the income payment period", "that the level of retirement income is irrelevant", and that "the presence or absence—as

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[29] It may be noted that a Valic brochure filed with Commission in February 1963 shows that a 65/35 combination of fixed and variable contracts purchased at age 40 with annual premiums of $1,200 for 25 years would provide a "fixed guaranteed surrender value" of $25,946. As shown above, the 25 year term Flexible Fund contract reflects approximately the same mix with a comparable cash surrender value. See note 18, *supra.*

Spellacy v. *American Life Ins. Co. Assoc.*, 144 Conn. 346, 131 A2d 834, referred to in *Valic*, 359 U.S. at 71, also dealt with a combination package.

well as the level—of benefits available during the deferred period is equally irrelevant." [30]

United now apparently embraces the view of the court below, which concluded that *Valic* "implicitly held that a company must bear a substantial part of the investment risk associated with the contract, as well as the mortality and expense risks, in order to qualify its products as 'insurance'" (R I-112). The court found the assumption of this risk in the minimum guarantee (R I-113). As we have already indicated, the court's analysis suffers from a misplaced emphasis in failing completely to give weight to the substantial investment risk assumed here by the contract holder. This should have been the focal point of its inquiry. *Valic,* in our opinion, does not deny the investor protections of the securities laws to the Flexible Fund contract holder who is unquestionably a participant in, and bears the risk of, an investment program.

In *Valic* the majority of the Court stated:

> "The difficulty is that, absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company. The holder gets only a pro rata share of what the portfolio of equity interest reflects—which may be a lot, a little, or nothing. We realize that life insurance is an evolving institution. Common knowledge tells us that the forms have greatly changed even in a generation. And we would not undertake to freeze the concepts of 'insurance' or 'annuity' into the mold they fitted when these Fed-

[30] United's brief below, pp. 14, 16, and 17. Under this thesis, there would be an annuity within the concept of *Valic* if the illustrative Flexible Fund contract holder who had paid $36,000 over a 30 year period was, for example, assured at age 65 of a monthly annuity payment of only $10 (so that it would take 300 years of annuity payments to equal his deposits) or a minimum cash value of $1,587 which purchases such an annuity!

eral Acts were passed. But we conclude that the concept of 'insurance' involves some investment risk-taking on the part of the company. The risk of mortality, assumed here, gives these variable annuities an aspect of insurance. Yet it is apparent, not real; superficial, not substantial. In hard reality the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense. It is no answer to say that the risk of the declining returns in times of depression is the reciprocal of the fixed-dollar annuitant's risk of loss of purchasing power when prices are high and gain of purchasing power when they are low. We deal with a more conventional concept of risk-bearing when we speak of 'insurance'. For in common understanding 'insurance' involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts. The companies that issue these annuities take the risk of failure. But they guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities—an interest that has a ceiling but no floor. There is no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." (Citations and footnotes omitted). 359 U.S. at 71-73.[31]

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[31] What the concurring opinion said of the contracts in *Valic* is equally applicable here:

"Accordingly, while these contracts contain insurance features, they contain to a very substantial degree elements of investment contracts as administered by equity investment trusts. They contain these elements in a way different in kind from the way that insurance and annuity policies did when Congress wrote the exemptions for them in the 1933 Act and the 1940 Act. Since Congress was intending a broad coverage in both these remedial Acts and since these contracts present regulatory problems of the very sort that Congress was attempting to solve by them, I conclude that Congress did not intend to exclude contracts like these by reason of the 'insurance' exemptions." 359 U.S. at 91.

The *Valic* language was, of course, directed to the contract in that case, and the Court was not considering a contract with other features. The fact, therefore that the foregoing passage contains language about the Valic contract which is not applicable to the Flexible Fund contract, is, in our opinion, not controlling. As we read the passage, in the context of the arguments that were being considered and rejected by the Court, it defines insurance in terms which the Flexible Fund contract does not satisfy.

The companies involved in *Valic* contended that the variable annuity was insurance because they assumed the risk of mortality. They insisted that "insurance" did not require that they assume any investment risk. Thus, for example, one company contended that the "risk of adverse investment results falls solely [in the case of the mutual company] or predominantly [in the case of the stock company] on the policy holders."[32] The other company argued that the "assumption of an investment risk by an insurance company is not an indispensable element or function of insurance."[33] The companies further argued that participating annuity policies, the exemption of which under the securities laws had never been challenged by the Commission, "manifestly were variable annuities."[34] A participating annuity policy, like a conventional annuity policy, embodies an assumed interest rate in both the accumulation and pay-out periods, and thus provides for a fixed return on the holder's contributions through the

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[32] Valic Brief, p. 36.

[33] Brief of Equity Annuity Life Insurance Company ("Ealic"), p. 9.

[34] Valic Brief, p. 43.

whole life of the contract. It was argued in *Valic* that in the participating policy the "assumed investment return was sufficiently low to eliminate any reasonable possibility that the company's results could fail to exceed it, and participation was substituted to permit the annuitant to share in dividends reflecting investment experience, mortality gains, and expense savings . . . The policy holder under such a contract shares in the investment results of the company in the same manner that the owner of the variable annuity does." [35]

In the quoted passage, the Court rejected the contention that the assumption of the risk of mortality by itself rendered the variable annuity an insurance arrangement.

Next, the Court dismissed the contention that the assumption of an investment risk by the company was not an indispensable element of insurance. It was, on the contrary, a necessary prerequisite; "the concept of 'insurance' involves some investment risk-taking on the part of the company."

The Court then defined the nature of this risk-taking and used language precisely delineating the difference between the Valic contract and the participating annuity, which the companies had argued were comparable. The Court stated that "the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense." The *sine qua non* of the "investment risk-taking on the part

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[35] Valic Brief, pp. 43-44. In the same vein, Valic argued (Brief p. 8) that the "distinction between the fixed-dollar annuity and the variable annuity is blurred when individual participating annuities are considered."

of the company" is its assumption of a guarantee of a fixed return. The presence of the fixed return in the participating annuity, and its absence in the Valic contract, was thus a critical distinction.[36]

When the Court spoke of a "fixed return" we assume it was using the term in its accepted insurance and financial sense. A "return" is a yield on capital, as distinguished from simply the giving back of the capital itself. In this context, the statement that "investment risk-taking" entails a "fixed return" means that the company guarantees interest on all net premiums; the investment risk which an insurance company traditionally assumes throughout the life of the contract and which United's actuary characterized as one of the basic risks shifted to the insurer by the insured.

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[36] "The idea [of the participating annuity] is to guarantee payments based upon more conservative interest and mortality rates than had hitherto been used, with a view to returning to annuitants any saving over the calculations in the form of dividends." These dividends are "not actually a return from investment income, but rather the return of an excess collected over and above the actual needs. Dividends, therefore, are not profits in any proper sense. They represent a yearly return of an overcharge in the premium. This overcharge, made in the interest of safety, is paid back as soon as an excess is definitely established." Magee, *supra*, at pp. 66-67, 584. "These dividends reflect the difference between the premium charged for a given class of policies and the actual cost of these policies as experienced by the company. • • • Dividends distributed to participating policy holders are not profits in a commercial sense, but instead are a return of an overcharge of premium". Mehr & Osler, *supra*, at p. 205.

As was pointed out in the concurring opinion, participating "contracts are sold as fixed-dollar obligations" and the "company is not committed by its literature to perform part of the job of a common-stock investment trust." *Valic*, 359 U.S. at 90.

When the Court declared at the beginning of the passage quoted above, that "absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company", it cited two articles. Both articles contended that the variable annuity was not insurance because there was an absence of a guaranteed yield. One article stressed the fact that the issuer was not undertaking the traditional risk of an assumed interest rate, the fixed return, and that the contract holder was being exposed to the yield risk.[37] The second article pointed out that the holder of insurance assumes only the risk that the company may not be able to pay the guaranteed amounts, and that the variable annuity did not provide the traditional obligation of an insurance company to

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[37] Bellinger, Hagamann and Martin, *The Meaning and Usage of the Word "Annuity"*, 9 J. Am. Soc. Ch. L. Under. 261, 268 (1955). This article, which commented on a form of variable annuity which did not provide a full assumption of the risk of mortality, stated:

> "*A true annuity involves insurance—the assumption of risk on the part of the issuing company.* The issuing company assumes the risk (a) that the mortality of the group may be less favorable than anticipated at the time the annuity is issued and (b) *that the assumed interest rate used in computing the amount of the periodic payments may prove to be excessively liberal.* However, *in the case of the 'variable annuity', there would be no assumption of* either of *these risks on the part of the issuing corporation. Instead of a guarantee* of these two variable elements *there would be complete exposure of the participants* in the 'variable annuity' *to such loss as might be occasioned by inadequate yield from the investments* and from unfavorable mortality that might be experienced within the group." (Emphasis added)

improve the holder's payments at a specific rate of interest.[38]

As we read *Valic* it is the assurance of a yield that provides the "fixed return" and "guarantee of fixed income" referred to by the Court. This is the "conventional concept of risk-taking when we speak of insurance." The company then provides a "benefit" by guaranteeing the insured that he will have an increment on the funds he deposits, and there is a "true underwriting of risks." If at any time during the life of the contract the company shifts the investment risk for the return or yield to the contract holder, as United does here, the arrangement embodies an invest-

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[38] Haussermann, *The Security in Variable Annuities, Ins.* L. J. June 1956, 382-385, 387 states:

> "Insurance in the legal and accepted definition of the term guarantees a fixed-dollar return. *The insured* in taking out any of these types of contract *assumes no risk other than the ability of the insurance company to pay the guaranteed amounts.*" (Emphasis added)

The article also contained the following statement of a principal executive of a major insurance company:

> "Risk is the basis of every contract issued by life insurance companies . . . Practically every life insurance operation binds the insurer to set aside a substantial portion of the consideration as a reserve to guarantee performance. *By contract this reserve must be improved at a specific rate of interest. There is no such protection behind the variable annuity contract. There is no contractual obligation to improve the policyholder's consideration.* In life operations the company actually assumes a risk. In the variable annuity it substantially avoids risk." (Emphasis added)

ment contract and its purchasers, as investors, are entitled to the protections of the securities laws.[39]

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[39] There need not be the concern referred to by the court below that if *Valic* is read as here urged that annuity policies will be restricted to their current form, which the court considered, as contravening an "explicit warning" of *Valic*. This concern does an injustice to the ingenuity of American business. One company has already fashioned an investment annuity with respect to the payout period which is not subject to the securities laws. In effect, under this arrangement the annuitant creates an irrevocable fund, which may consist of a portfolio of securities, to provide a life annuity from the insurance company involved; the annuitant, and not the insurance company, manages the portfolio and he is at all times free to sell, buy or hold securities, as he pleases; the insurance company performs only insurance functions and by contract prescribes (1) a schedule of guaranteed annual premium rates to be paid from the annuitant's fund, cast in terms of a percentage of the value of the fund at each annual premium date, and (2) a schedule of payments to the annuitant for the ensuing year, cast in terms of a fixed dollar amount for each $100 of annual premiums paid; on the annuitant's death, the insurance company acquires as a terminal premium any remaining balance in the fund. In essence, the annuitant dedicates a fund and during his lifetime annually purchases with premium payments from the fund a series of one year term conventional fixed dollar annuities, with the premium payment varying from year to year with the value of the fund as managed by the annuitant who receives an annuity which is simply a direct function of the permium payment. See prospectus of Investment Annuity Inc. for a fuller description of the arrangement.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

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SUPREME COURT, U. S.
DEC 30
JOHN F. DAVIS

IN THE

Supreme Court of the United States

October Term, 1966.

No. 428.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

UNITED BENEFIT LIFE INSURANCE COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPPOSITION OF RESPONDENT TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

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